Supreme Court, U.S.
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Nos. 97-1356 and 97-1357

In The

Supreme Court of the United States

October Term, 1997

COUNTY OF AITKIN, *et al.*,

Petitioners,

vs.

MILLE LACS BAND OF CHIPPEWA INDIANS, *et al.*,

Respondents.

JOHN W. THOMPSON, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE CITIZENS EQUAL RIGHTS ALLIANCE (CERA) AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

WHETHER THE NELSON ACT WAS INTENDED BY CONGRESS AS A DISPOSAL ACT TO EXTINGUISH ALL RIGHT, TITLE, CLAIM AND INTEREST TO LANDS AND THE USUFRUCTURY RIGHTS OF THE TREATY OF 1855 UPON THE LANDS INCLUDING THE RIGHTS TO HUNT, GATHER WILD RICE AND FISH OF THE MILLE LACS BAND OF CHIPPEWA?

WHETHER THE UNITED STATES CONSTITUTION GRANTS TO THE JUDICIAL BRANCH THE AUTHORITY TO COMPEL THE STATE OF MINNESOTA TO REGULATE HUNTING, GATHERING OF WILD RICE AND FISHING ON STATE AND PRIVATE LAND FOR THE PRIMARY BENEFIT OF THE MILLE LACS BAND OF CHIPPEWA BY REINSTATING AN INDIAN TREATY?

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INTEREST OF THE AMICUS CURIAE[1]

The Citizen's Equal Rights Alliance (CERA), is a non-profit association of non-Indians and Indians incorporated and licensed under the laws of the State of New Mexico and headquartered in Santa Fe, New Mexico. CERA's interest in this lawsuit arises from CERA's advocacy of the principle that all people should be treated equally, whether Indian or non-Indian. In this, CERA's interest mirrors that of Petitioners. The Chippewa Bands' position that they are entitled to the reinstatement of treaty rights to avoid application of state police power authority to regulate hunting, fishing and gathering rights applicable to all other state citizens, violates the principle of equal rights under law. This amicus brief supports the Petitions for Certiorari for the Counties, Docket No. 97-1356 and the Landowners, Docket No. 97-1357.

SUMMARY OF THE ARGUMENT

The main argument of this brief challenges the authority of the Courts of the United States to reinstate treaty rights deemed extinguished or terminated for eighty years by all parties. Upon the land cession of the Mille Lacs Band and their consent to be placed on a reservation by the treaty of 1855, Congress placed the

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

termination of the treaty rights on non-reservation land to hunt, fish and gather wild rice at the pleasure of the President. President Zachary Taylor terminated the usufructuary treaty rights by Executive Order on February 6, 1850. this termination and further act of full extinguishment of the Mille Lacs reservation by the Nelson Act of 1889, ch. 24, 25 Stat. 642, §§ 3, 5 and 6, was treated by the United States as an extinguishment not only of the reservation but also of the treaty rights until 1970. In 1970, the United States with a change of Indian policy to restore tribal sovereignty, brought suit on behalf of the Leech Lake Band of Chippewa to restore the usufructuary treaty rights from the Treaty of 1837. *Leech Lake Band of Chippewa v. Herbst*, 334 F. Supp. 1001 (D.Minn. 1971). The 1837 Treaty established all of the claimed treaty privileges for all of the Chippewa Bands, including Mille Lacs. Although there were multiple land cession treaties with the various Chippewa Bands, the restoration argument of the Bands and the United States has not varied in the many cases brought by the United States has not varied in the many cases brought by the United States on behalf of the different Bands. This case, therefore, shares many facts and potential consequences with the *Leech Lake Band of Chippewa v. Cass County* case, Docket No. 97-174, already briefed and argued before this Court.

By unanimous opinion of the court in *State of Alaska v. Native Village of Venetie*, 1998 WL 75038 (U.S.), 118 S.Ct. ___ (1998), this Court ruled that Congress' intent to extinguish or terminate an Indian reservation is the paramount consideration in examining whether a reservation was actually terminated. This reasoning comports to the plain language of the Property Clause, Art. IV, Sec. 3, Cl. 2, that "Congress shall dispose of the territories . . . " This

very simple reasoning makes Congress accountable for the use of the territorial war powers. There is no question that Congress intended with the Nelson Act of 1889 to terminate all of the Chippewa reservations except Red Lake and White Earth. Congress has never acted in any way to restore the Mille Lacs reservation. There is a real question whether the constitutional power exists in Congress to restore only the usufructuary treaty rights to any Indian Tribe over lands no longer in its jurisdiction under the Property Clause. Instead of leaving this question to Congress, the Federal Courts in the Eighth Circuit decided they would restore the treaty rights of the 1837 Treaty to the Mille Lacs Band at the urging of the Executive Branch. This amicus brief challenges whether the federal courts have jurisdiction under Art. III to even hear a suit brought by the Executive Branch asserting Property Clause authority.

STATEMENT OF CASE

Beginning in 1971 with the Leech Lake Band of Chippewa, the United States on behalf of different bands of Chippewa Indians, a tribe recognized under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 et seq., has brought several lawsuits against the State of Minnesota to reinstate Indian treaty rights deemed extinguished by all parties from the 1890's to 1970. Mille Lacs is the latest seeking to reinstate the hunting, wild rice gathering and fishing rights. So far for the Chippewa, the United States has participated in more than six suits in Minnesota and Wisconsin for the Chippewa which displace the regulatory powers of those states to administer the hunting, gathering and fishing rights on state and private lands.

Minnesota and Wisconsin are not public land states with vast amounts of federal land available for withdrawal or reservation. The use of the term "reservation" as to the Mille Lacs Band is a misnomer. The "reservation" designation flows from the fact that some Indians still own land and the Band has purchased land within the original boundaries of the reservation expressly terminated by the Nelson Act of 1889, ch. 24, 25 Stat. 642. The United States refers to the Mille Lacs "reservation" because it asserts that the 1837 treaty rights still exist. The United States claims that the possible existence of an unextinguished Indian treaty right requires a court to find that these privately owned lands are "Indian country" and therefore are "Indian territory" entitling the Indian Band to protection of their treaty right under the Treaty Clause, Art. II, Sec. 2 and thereby the Supremacy Clause, Art. Vl, Cl. 2. This argument in effect creates permanent reservations with sovereign rights at least equal if not actually superior to the states. See *Leech Lake Band of Chippewa v. Cass County* briefs.

ARGUMENT

I.

INTRODUCTION

The Mille Lacs decisions of the Eighth Circuit conflict with the decisions of this Court in *South Dakota v. Bourland*, 508 U.S. 679 (1993) and *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) which interpret the extinguishment of Indian lands as also being an extinguishment of Indian Treaty claims. The *Yankton Sioux* argument presented by the United States for the tribe was very similar

to the reasoning used in this case. The Eighth Circuit ruled for the tribe in that case as well. Just as the Eighth Circuit was overruled in *Yankton Sioux*, so should it be in this matter. As *Yankton Sioux* observed, these cases fall within a line of termination cases which began with *DeCoteau v. District County Court*. See, e.g., *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

The *DeCoteau* Court determined that the State of South Dakota possessed jurisdiction because the reservation had been extinguished and could not be "restored" by the Secretary. In overruling the Eighth Circuit, the Court established the process used to determine whether the use and occupancy rights of the Tribe were terminated. *DeCoteau*, 420 U.S. at 442-47. For the first time, the court distinguished between extinguishment acts and surplus lands acts. A conclusion of termination indicates permanent extinguishment of all tribal interest in the land. For the lands in question, the compliance with the Nelson Act met this exacting standards, as well as the standard expressed in *Hagen v. Utah*, 114 S.Ct. 958 (1994), for the disestablishment of "Indian country." Nelson Act of 1889, ch. 24, 25 Stat. 642 (1889). The Nelson Act is the Minnesota version of the General Allotment Act of 1887, ch. 119, 24 Stat. 388, §§ 5 and 6.

The Eighth Circuit discussion of the Nelson Act is based upon an error which fails to acknowledge the impact of *Hagen v. Utah*, on the *Seymour v. Superintendent* interpretation of the criminal statute defining "Indian country." Compare 18 U.S.C. § 1151 (1994) with *Hagan v. Utah*, 114 S.Ct. 958 (1994) and *Seymour v. Superintendent*, 368 U.S. 351 (1962). As the recent *Native Village of Venetie* decision makes crystal clear, the definition of the "Indian country" requires a federal set aside of land. In this case

there is no federal set aside of these lands upon which the hunting, gathering of wild rice and fishing is supposed to take place. In 1971, the federal district court of Minnesota in *Leech Lake Band v. Herbst*, 334 F. Supp. 1001, 1005 (D. Minn. 1971), inappropriately relied on *Seymour* to hold that the 1855 Treaty with the Chippewa was not extinguished by the Nelson Act. *Leech Lake Band of Chippewa Indians v. Herbst*, 334 F. Supp. 1001, 1005 (D.Minn. 1971); see, e.g., *Leech Lake Band v. Cass County*, 108 F.3d 821 (opinion by Judge Murphy); *Mille Lacs Band of Chippewas v. Minnesota*, 861 F. Supp. 784 (1994) (same); *Mille Lacs Band of Chippewas v. Minnesota*, 853 F. Supp. 1118 (1994) (same). The Eighth Circuit since 1971 has consistently held that the usufructuary treaty rights specifically recognized in the treaty of 1837 were not extinguished by the termination of the 1855 treaty rights because the acts of Congress and express language of the President were not made sufficiently clear to the Chippewa. The Eighth Circuit has always addressed the extinguishment from the perspective of the Indians' understanding, based on the United States' trust responsibility, and never addressed whether a power to restore Indian treaty rights not reserved at statehood exists under the Constitution of the United States.

By relying on "Indian country" as an exemplar of tribal sovereignty, the Eighth Circuit ignored the principle that "Indian country" has no relevance to an express extinguishment act of Congress and can provide no limitation thereto. See *Hagen v. Utah*, 114 S.Ct. at 967. The Eighth Circuit, without expressly citing the law of the case or res judicata, has continued to use its 1971 precedent of *Herbst* for all Chippewa cases proceeding after the initial Leech Lake Band decision. In doing so, the Eighth

Circuit has completely avoided applying the extinguishment line of cases to any of the Chippewa Bands claims, including Mille Lacs. The new decisions of *South Dakota v. Yankton Sioux Tribe*, 118 S.Ct. 789 (1998) and *State of Alaska v. Native Village of Venetie*, 1998 WL 75038 (U.S.), 118 S.Ct. ___ (1998) directly contradict the Eighth Circuit land status rationale as to treaty rights extinguishment and "Indian country" respectively.

In no way can the Nelson Act be construed as anything but a disposal act. The Nelson Act disposed of all lands which had been reserved for the Leech Lake Band and the Mille Lacs Band, under allotments, timber sales or homesteads. 25 Stat. 642. The Eighth Circuit Court of Appeals' extrapolation of the initial *Herbst* error to prevent the lawful operation of a proper disestablishment act only makes the error more needful of correction. Judge Murphy's expansive view of treaty cases which are no longer proper precedent led her to prevent extinguishment of treaty rights, where the disestablishment act required relinquishment of all right, title, and interest to the reservation. The Eighth Circuit has not reviewed the first impression ruling of *Leech Lake Band v. Herbst* after the case law on extinguishment developed in higher courts. The fundamental shift in higher precedent leaves the Eighth Circuit on uncertain ground and in need of redirection.

II.

DISPOSAL OF THE TERRITORIES IS A REQUIREMENT WHICH PROTECTS FEDERALISM.

Congressional power over territorial lands was meant to be temporary. As the Constitution provides,

"Congress shall dispose of the Territories . . . " U.S. Const., Art. IV, Sec. 3, Cl. 2. The principle mandating disposal has long been upheld by this Court. See *U.S. v. Midwest Oil*, 236 U.S. 459 (1915); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845), *U.S. v. Gratiot*, 39 U.S. (14 Pet.) 525 (1840). In other areas, Congress itself recognized the temporary nature of its regulatory authority. See Federal Land Policy Management Act of 1976 (FLPMA), 43 U.S.C. § 1701 et seq. Additionally, this Court recently required specific congressional action to create permanent reservations in a state. *Alaska v. United States*, 117 S.Ct. 1888 (1997); see also *New Mexico v. Watkins*, 969 F.2d 1122 (D.C.Ct.App.1992) (affirming in part, and on Property Clause grounds, 783 F. Supp. 633 (D.D.C.1992)).

Congress expressly terminated the Mille Lacs reservation with the Nelson Act. After the 25 year trust period expired, the Mille Lacs tribal rights to these lands and all of the rights upon these lands were extinguished. The United States, through the Clinton Administration, is attempting to subvert the old cases of *Fletcher v. Peck*, 10 U.S. (6 Cr.) 87 (1810) and *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823) and fundamentally alter the sovereignty balances set by the Constitution. The United States acknowledged, in the Treaty with the Chippewa of 1855, that it held sovereign title to the lands under the Property Clause, Art. IV, Sec. 3 and that the Bands held only "Indian title." This "Indian title" gave only a right to use and occupy the land until the right was terminated by Congress. "Indian title" has been transformed by clever legal wording referring to the lands as "Indian territory" into a full sovereign claim over the land. Congress has given the tribes many powers of self-government but has

never linked the powers to land status. The power Congress has allowed the tribes flows completely from Congress. Any delegation of authority is revocable at will because there is no sovereign connection to the "Indian territory." The Clinton administration is literally attempting to expand the definition of the word "territory" just as they have expanded the definition of "reservation" into any lands where any Indians live.

Whatever Indian sovereignty existed in the Mille Lacs Band was determined by the Treaty and is entirely subject to the plenary authority of Congress. *United States v. Kagama*, 118 U.S. 375 (1886). Even under the Treaty of 1855, the Mille Lacs Band was not the supreme sovereign over this land. The Treaty acknowledged the territorial sovereignty of the United States. From 1855 until the termination of the reservation by the Nelson Act in 1889 – with the disposal by sale of the lands – these lands were federal reserved public domain lands. Arguably until the 25 year trust period expired for the final sales and disposition of the lands, the United States retained territorial jurisdiction against the states on the allotted lands acquired by Indians. The State of Minnesota accepted jurisdiction and exercised full jurisdiction over former Chippewa lands under the Nelson Act until 1971 when in a case of first impression, the federal district court erroneously concluded that the Nelson Act was not a termination of the usufructury treaty rights of the Leech Lake Band of Chippewa.

Although asserted under the guise of unextinguished treaty rights, this case is merely a variation on a theme – the United States attempting to forcibly displace state jurisdiction. There is no practical difference between an

Indian tribe reacquiring lands by purchase or by asserting a claim to an extinguished treaty right. Tribal purchase of lands in fee simple alone does not divest state jurisdiction. It is only the interpretation the United States has placed on its General Welfare/Spending Clause, Art. 1, Sec. 8, Cl. 1, trust responsibility through the Indian Reorganization Act and the Indian Self-Determination Acts which purport to dispossess state jurisdiction. This argument is fully made to the Court in an Amici Curiae Brief submitted by CERA in the current Leech Lake case. The questions presented in this case demonstrate an overall problem with judicial review created in the *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) decision. That problem stems from the two holdings which dealt specifically with the Court declining to protect constitutional rights in territories of the United States and the use of the political question to prevent the Court from ever revisiting the perpetuation of slavery in the territories.

Although the Thirteenth Amendment effectively overruled the first holding in *Scott v. Sandford* concerning the ability to make freed Negro citizens, the rest of the majority decision has been left completely intact. To this day the Court has never reexamined its authority in the territories. Constitutional rights still do not apply to persons residing on lands subject to the plenary authority of Congress under the Property Clause. This is precisely the result the Founding Fathers attempted to prevent with the structure of the Constitution because they had fought the Revolutionary War to gain full citizenship rights for the former territorial colonies of Great Britain. As George Mason, the most prominent Anti-federalist, predicted in his speech to the Constitutional Convention, because of slavery, this very carefully constructed structural balance

to protect the People's rights would not hold. He demanded a Bill of Rights and the battle for ratification began. It is hard to believe that more than two hundred years later we are still having the same fight, especially after such a costly Civil War. The Civil War did result in the Amendments needed to fix the territorial problem. It also resulted in a virtually completely Federalist victory. Even though the Southern States gave three major chances to the Supreme Court to apply the Fourteenth Amendment against the territorial war powers, three times the Court declined and used the rationale of *Scott* without citing to the actual decision to deny jurisdiction. *State of Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1867); *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50 (1868); and *Texas v. White*, 74 U.S. (7 Wall.) 700 (1869).

It is not the purpose of this brief to question the result of the Civil War. The purpose is to question why the Supreme Court has never placed the will of the People in the passage of the Civil War Amendments back into the dominant position in the structural balance. To this day, the definition of "sovereign people" in Black's Law Dictionary is still the perverted definition from *Scott v. Sandford*. No group of people has been more victimized by this inaction on the part of the Supreme Court than the Indian people. The Indian people, although called citizens because of the Naturalization Act of 1924, 8 U.S.C. § 1401, only have rights when they are not on territorial lands. How much of this result flows from the fact that the Indian cases of *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *In re Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867) became a major part of the Reconstruction Act debate will be left for historians to decide if the result is ever altered by this Court. Certainly, the words of Justice

Davis in *In re Kansas Indians* quoting the 1854 Treaty with the Shawnee have been ignored. "It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, 'but until they are clothed with the rights and bound to all the duties of citizens' they enjoy the privilege of total immunity from state taxation." Id. at 756. Indian citizenship has not changed the willingness of the Court to confront the territorial war powers.

Under the current United States perspective, Indian treaties were made outside of the territorial boundaries of the United States. Congress has never passed any act for or against the Indian tribes which disclaims territorial jurisdiction of the United States over lands currently or formerly occupied by Indian tribes. This argument asserted by the Executive Branch attempts to displace Congress' plenary power over the Indian tribes and its Property Clause authority. Instead, it places a potentially unlimited power to reinstate treaties within the territorial boundaries in the Executive Branch under the Department of Justice. These reinstated treaties hope to displace state jurisdiction by reasserting the Supremacy Clause to both reinstate the Indian property rights and to attach Indian sovereignty rights to the land. Although this Court has a long history of avoiding applying the Fourteenth Amendment to Indian cases because of the direct conflict between the Fourteenth Amendment protections and the Property Clause's inherently unaccountable powers, the reinstatement of treaty rights without examining the Fourteenth Amendment consequences goes too far.

The United States asserts it is merely protecting tribal interests by reasserting these treaty rights. However, the United States' claim that these reasserted treaty rights are

treaties under the terms of the Supremacy Clause entitled to assertion as the supreme law of the land creates an ability to completely displace state law. The Supremacy Clause requires that the treaty be made under the authority of the United States Constitution to be the supreme law of the land. The adoption of the Fourteenth Amendment in 1868 essentially prevented any more treaties from being negotiated with the Indian tribes. There is no doubt that at the time of negotiating and ratifying the Indian treaties, the United States used the treaties primarily to negotiate land cessions. The 1855 Treaty with the Chippewa was a treaty of cession. These land cessions were originally executed under the authority of the Treaty Clause. However, the power to administer the lands as territory was in the Property Clause.

The Treaty Clause defines a mandatory process, necessary to create a treaty. It carefully separates and balances the power of the Executive Branch to enter into international agreements against the power of Congress to make domestic law. There is no point of having a constitution to limit the domestic powers of the federal government if the international powers are unlimited and superior to domestic law. The United States is incorrect in asserting that the Supremacy Clause creates such a result. Entering into a treaty does not alter the doctrines of separation of powers or checks and balances. The decision to enter a treaty requires both the President and the Senate for ratification. The treaty power is a very carefully constructed political process. The Executive can enter a treaty which then is not ratified by the Senate, rendering the treaty null and void. The most famous example of this was President Wilson and his League of Nations inclusion at the end of World War I which failed

ratification in the Senate. This political decision was not subject to judicial review. It is an inherently political decision whether a treaty passes this constitutional process.

Reinstating a treaty cannot be done by the courts under the Treaty Clause because it violates the political process created in the clause. The treaty power does not bestow upon the courts any authority except to review whether the other branches adhered to the required process. The power being asserted by the Eighth Circuit to restore the 1837 Treaty is actually derived from the Property Clause. To allow reinstatement of treaties, judicial review must include the ability to overrule an express political decision to extinguish or terminate Indian reservations made by Congress to dispose of the public domain lands. No party in this case has questioned the constitutionality of the Nelson Act. Again, the courts undoubtedly possess the power to review whether the disposal act contained sufficient process to protect constitutional rights. The courts as demonstrated by *DeCoteau* and the whole line of extinguishment cases, may set due process requirements which Congress must meet. Lands not properly disposed may still have Indian treaty rights attached subject to the plenary authority of Congress to remedy. However, ensuring due process is not an exercise of an affirmative power to restore Indian rights over land specifically disposed. This is a power not contained in Art. III.

While Art. III does allow judicial review to determine if property rights were taken or civil rights were violated by the United States in extinguishing a treaty, the power does not extend to review of the political decision to terminate. This includes not only the power of Congress under the Property Clause but also the power of the Executive under the Treaty Clause. In this case, the Eighth

Circuit actually managed to violate separation of powers against both other branches by reinstating the treaty against an express termination by Congress and by ignoring the President's exercise of properly and expressly delegated power to terminate the 1837 treaty privileges. The fact that Indian policy was altered subsequently does not affect the fact the President ended the privilege.

The United States Supreme Court correctly ruled in the extinguishment line of cases starting with *DeCoteau v. District County Court* that the extinguishment is examined from the Intent of Congress at the time of passage of the disposal act. The Eighth Circuit erred in examining the Mille Lacs treaty claim from the United States perspective that the Nelson Act should be interpreted based upon present law. The Eighth Circuit should have followed the extinguishment line of cases and ruled that the treaty rights were extinguished. By following the United States perspective, the Court became the instrument to impose an ultra vires restriction on Minnesota's jurisdiction to regulate hunting, fishing and wild rice gathering on state and private lands.

III.

THE PURPOSE OF JUDICIAL REVIEW IS TO PROTECT THE RIGHTS OF THE PEOPLE FROM USURPATION BY GOVERNMENT.

The case at bar is an excellent example of how the Court's order does not completely divest Minnesota of jurisdiction – it compels Minnesota to exercise its regulatory authority in a manner defined by the court. The Eighth Circuit ordered the State of Minnesota to enter an agreement with the Mille Lacs Band, placing the tribal "treaty" rights ahead of all other use rights on Mille

Lacs.[2] This type of court order is the worst sort of federal mandate. See *Leech Lake Citizens Committee v. Leech Lake Band of Chippewa Indians*, 355 F. Supp. 697 (D. Minn. 1973). Certainly, the constitutional reasoning is identical to that asserted by Congress to compel specific state regulatory action. See, e.g., *Printz v. United States*, 117 S.Ct. 2365 (1997), *New York v. United States*, 505 U.S. 144 (1992). This result is just as unconstitutional as a federal mandate which compels a state to regulate a specific way according to a federally funded program.

It is particularly disturbing to see a federal court caught in this separation of powers violation. An Article III court must protect the rights of all the people in an unbiased manner. The credibility of the courts depends on the people believing they are fair and impartial in the protection of constitutional rights. Part of that responsibility is ensuring that the elected representatives of the People may politically be held accountable by the People. When government policy based on territorial power favors a minority over the majority, the People literally have no right to even question the authority in court and cannot hold their elected representative accountable for discrimination which occurs outside of their district. It is a true "slippery slope" problem because by the time the discrimination hits the majority, it is too late to remedy the initial claim of territorial power. The perfect example of this assertion is in *Kansas v. Colorado*, 206 U.S. 46 (1907) discussing the Property Clause power against the Tenth

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[2] This agreement will survive the Leech Lake ruling of this Court unless a direct order issues requiring the Eighth Circuit to review its Mille Lacs rulings based upon the decisions of the current term.

Amendment concerning the Reclamation Act of 1902, 32 Stat. 388.

> "These arid lands are largely within the Territories, and over them by virtue of the second paragraph of section 3 of Article IV heretofore quoted, or by virtue of the power vested in the National Government to acquire territory by treaties, Congress has full power of legislation, subject to no restrictions other than those expressly named in the Constitution, and, therefore, it may legislate in respect to all arid lands within their limits. As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. We do not mean that its legislation can override state laws in respect to the general subject of reclamation. While arid lands are to be found, mainly if not only in the Western and newer States, yet the powers of the National Government within the limits of those States are the same (no greater and no less) than those within the limits of the original thirteen, and it would be strange if, in the absence of a definite grant of power, the National Government could enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders. Nor do we understand that hitherto Congress has acted in disregard to this limitation." *Kansas v. Colorado*, 206 U.S. at 92.

It only takes a reading of the Clean Water Act, 91 Stat. 1566, 33 U.S.C. § 1251, et seq., and its amendments to realize that this judicially approved discrimination against the Western States has now spread to include all

of the States in regards to wetlands and tribal grants of authority to regulate, 33 U.S.C. § 1377 of the Clean Water Act, under the same power analysis as the Reclamation Act.

The Mille Lacs decisions, like the Leech Lake decisions, hold that the United States is not accountable for placing the rights of the Mille Lacs Band ahead of the rights of the majority of the citizens of the State of Minnesota. The decisions make it seem this is a proper role for the federal government instead of the extra-constitutional action it is.

Federalism is the separation of powers doctrine which protects the states from intrusions by *any* of the federal branches on powers reserved to the states. It is unusual that this intrusion is from the Judicial Branch because of the limitations placed in Art. III. This is not an original jurisdiction action which grants very broad authority to this Court on very limited subjects. The Eighth Circuit is claiming appellate jurisdiction includes an affirmative constitutional power to act to remedy the disposal of the Mille Lacs reservation.

There is no constitutional power which allows the United States Congress or any other branch of the federal government to unilaterally divest state jurisdiction and to make it federal except under direct war power authority. The intent of the disposal of the public domain was to create states to prevent the territorial war powers from becoming perpetual. Throughout the discussions of the overall effect of the territorial powers was a great concern articulated by the Anti-federalists about maintaining a standing army. No group of persons understood that constitutional rights were not recognized in a territory

because of the war power authority under English common law better than the men that started our Revolutionary War and drafted this Constitution. They specifically worded Art. IV, Sec. 3 to place the creation of states in Clause 1 ahead of the compelled disposal of the territory in Clause 2. These clauses have been erroneously interpreted separately for too long. The first Clause is an express limitation on the second.

Ultimately, the reinstatement power is a question of the nature of judicial review. If judicial review is primarily to protect the People's rights then the People are the supreme sovereign. If judicial review was intended to further the power of the national government, then the government is the supreme sovereign. Under the first analysis the courts are accountable to the People to protect their rights. Under the second analysis the courts become the most dangerous branch of government to the People. In point of fact, this second result has happened because the trial courts do not examine the constitutionality of a federal mandate before they apply it to a father delinquent on child support or to protect the rights of a part Indian child to be with the only parents the child has ever known.

The Court must decide the nature of judicial review in either this case or apply its decision on this fundamental question from the *Leech Lake v. Cass County* case already before this Court. The Fourteenth Amendment confrontation with the Property Clause power is ripe and must be decided before lower courts, both state and federal, lose all credibility by refusing to hear cases because they must overrule federal mandates that contribute major amounts of money to state budgets. No trial judge can take on the responsibility for terminating state

funds without major support from the United States Supreme Court that it must be done to protect civil rights.

CONCLUSION

The decisions of the Eighth Circuit Court of Appeals should be reversed. This Court should grant the petition to allow this correction and to address the important judicial review question presented by the Eighth Circuit not reviewing its 1971 precedent against a whole line of Supreme Court decisions to the contrary.

Respectfully submitted,

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